



Signed and Filed: December 18, 2019

A handwritten signature in cursive script, reading "Dennis Montali", is written over a horizontal line.

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 16-30063-DM
YELLOW CAB COOPERATIVE, INC.,)	
)	Chapter 11
)	
Debtor.)	
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RANDY SUGARMAN, CHAPTER 11)	Adversary Case No. 18-03075
TRUSTEE FOR YELLOW CAB)	
COOPERATIVE, INC.,)	Date: November 4, 2019
)	Time: 10:00 a.m.
Plaintiff,)	Place: U.S. Bankruptcy Court
)	Courtroom 17, 16th Floor
v.)	San Francisco, CA 94102
)	
DOUGLAS A. TAYLOR, AND DOES 1-)	
10,)	
)	
Defendants.)	
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**MEMORANDUM DECISION REGARDING DEFENDANT'S
MOTION TO DISMISS ADVERSARY PROCEEDING**

On November 4, 2019, this court held a hearing on the motion of defendant Douglas A. Taylor ("Taylor") to dismiss the Amended Complaint for Professional Negligence, Accounting Malpractice, and Negligence ("Amended Complaint") filed by plaintiff Randy Sugarman, the chapter 11 trustee ("Trustee") for debtor Yellow

1 Cab Cooperative, Inc. ("YCC"). For the reasons set forth below,
2 the court is denying Taylor's motion to dismiss (the "MTD").

3 A. The Amendments to The Complaint Give Rise to a Potential
4 Defense to the *In Pari Delicto* Defense

5 In the initial complaint, Trustee asserted claims for
6 professional malpractice, accounting malpractice, and conspiracy
7 against Taylor, alleging that Taylor conspired or worked with
8 YCC's officers and directors to permit improper distributions to
9 stakeholders and to shield assets from creditors. Applying
10 California law and precedent from the District Court for the
11 Northern District of California, this court held that the
12 doctrine of *in pari delicto* or "unclean hands" barred Trustee's
13 claims and granted Taylor's initial motion to dismiss, with
14 leave to amend.

15 The court concluded that the allegations of the initial
16 complaint that Taylor had conspired with YCC's officers and
17 directors to divert funds from creditors precluded Trustee from
18 asserting the "adverse interest exception" to the "unclean
19 hands" doctrine. See Memorandum Decision Regarding Defendant's
20 Motion to Dismiss Adversary Proceeding entered on April 29, 2019
21 at Dkt. No. 13, pp. 9-10. In particular, the allegation that
22 Taylor had conspired with all of YCC's officers and directors
23 gave rise to the "sole actor defense" to Trustee's "adverse
24 interest exception" and the Trustee's claims were barred as a
25 matter of law.

26 In its Memorandum Decision, the court stated:

27 Taylor asserts that any damages arising from
28 the alleged conduct were not caused by him, but by
YCC's officers and directors, who have already

1 settled with the Trustee. Causation is a factual
2 issue, and but for the claims being barred under the
3 in pari delicto doctrine, Trustee has alleged
sufficient facts to survive a motion to dismiss
based on lack of causation.

4 That said, Trustee may have an independent
5 claim for malpractice against Taylor not arising
6 from and independent of the alleged fraud of the
7 debtor and its members. The court will therefore
dismiss all claims in the Complaint, with leave to
amend the accounting malpractice claim.

8 *Id.* at 10 (emphasis added).

9 In the Amended Complaint, Trustee no longer asserts a
10 conspiracy cause of action against Taylor, nor does he allege a
11 claim for fraud. Instead, the claims that he now asserts -
12 professional negligence, accounting malpractice, and negligence
13 - do not require a showing of intent or scienter by Taylor.
14 Nonetheless, Trustee has revised the initial complaint to allege
15 that Taylor conspired or acted with "certain of YCC's officers
16 and directors, or a subset of YCC's officers and directors, to
17 divest YCC of valuable and necessary assets to allow improper
18 distributions to YCC members[.]" See Amended Complaint at Dkt.
19 No. 19 at ¶ 12 (emphasis added); see also ¶ 13 of the Amended
20 Complaint. By alleging that Taylor acted with only a subset of
21 YCC's officers, Trustee is attempting to foreclose any
22 application of the "sole actor" exception and the *in pari*
23 *delicto* defense that gave rise to dismissal of the initial
24 complaint. This allegation is sufficient to defeat Rule 12(b)
25 dismissal on the grounds that "unclean hands" bars Trustee's
26 claims. In other words, these amendments give rise to a
27 potential defense to the *in pari delicto* defense.

1 B. The Court Cannot Base Dismissal on Inconsistencies Between
2 the Initial Complaint and the Amended Complaint

3 In his MTD, Taylor notes the inconsistencies between the
4 factual allegations of initial complaint (alleging that Taylor
5 conspired with YCC members) and the Amended Complaint (alleging
6 that Taylor conspired with a subset of YCC members). Taylor
7 argues that Trustee is bound by his initial allegations and thus
8 by the court's initial decision to dismiss the adversary
9 proceeding on the grounds of *in pari delicto*, citing *Airs*
10 *Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt.,*
11 *Inc.*, 744 F.3d 595, 600 (9th Cir. 2014).

12 In *Airs Aromatics*, the Ninth Circuit affirmed a dismissal
13 of an action without leave to amend, holding that amendment
14 would be futile because a "party cannot amend pleadings to
15 directly contradict an earlier assertion made in the same
16 proceeding." There, a patent holder suing for infringement
17 contended that the patent was in "usage" during the relevant
18 time period because it was the subject of litigation. The
19 plaintiff admitted to the district court and in its Ninth
20 Circuit appellate briefs, however, that it was "not actively
21 using the marks" and "that its activity was 'effectively on
22 hold' during the period of litigation." Because these admitted
23 facts would preclude the patent infringement action as a matter
24 of law, the district court concluded that leave to amend would
25 be futile. *Id.*

26 In contrast, Trustee here has made no concessions which
27 would on their face defeat his claims for malpractice and
28 negligence. Therefore, this court will follow the line of Ninth
Circuit cases holding that "there is nothing in the Federal

1 Rules of Civil Procedure to prevent a party from filing
2 successive pleadings that make inconsistent or even
3 contradictory allegations[.]” *PAE Gov’t Servs., Inc. v. MPRI,*
4 *Inc.*, 514 F.3d 856, 860 (9th Cir. 2007). As stated in *Williams*
5 *v. Cty. of Alameda*, 26 F.Supp.3d 925, 936 (N.D. Cal. 2014):

6 Additionally, the Court will not consider any facts in
7 the first amended complaint (“FAC”) that are not pled
8 in the SAC. In their motion papers, Defendants rely on
9 allegations in the FAC that are not present in the SAC
10 to support their arguments for dismissal. However, it
11 is well-established that an amended pleading
12 supersedes the original pleading and renders it of no
13 legal effect, unless the amended complaint
14 incorporates by reference portions of the prior
15 pleading. . . . While prior pleadings may be
admissible in evidence against the pleader, the Court
is bound to accept as true allegations in the
operative pleading on a motion to dismiss, and
generally cannot consider evidence outside the
pleadings without converting a motion to dismiss into
a motion for summary judgment.

16 *Id.* (multiple citations and quotations omitted; internal
17 footnote omitted) (emphasis added). In any event, amending the
18 complaint to add “certain” as a modifier to “officers and
19 directors” is not inherently contradictory. To the extent that
20 the Amended Complaint may be inconsistent with allegations made
21 in other state court proceedings, the court cannot address those
22 inconsistencies in the context of a motion to dismiss, as it
23 involves evidence outside the pleadings.

24 C. The Court Will Not Require Further Amendment

25 Trustee is not asserting a fraud claim against Taylor and
26 is no longer pursuing the conspiracy claim against him.
27 Nonetheless, paragraph 13 of the Amended Complaint does allege
28 that Taylor “was complicit with certain members or a subset of

1 members of YCC's management's to misrepresent YCC's financial
2 health to its members, the California Office of Self-Insurance
3 Plans, to which YCC reported its compliance annually with
4 workers' compensation self-insurance requirements, and the
5 California Department of Motor Vehicles, to which YCC reported
6 its compliance annually with commercial automobile liability
7 self-insurance regulations."

8 While these allegations allude to some elements of a fraud
9 claim (misrepresentations), Trustee's claims against Taylor are
10 not predicated on fraud, but on his alleged malpractice and
11 negligence. Moreover, Trustee was not a party to the
12 transactions between YCC and Taylor. Furthermore, the
13 allegations of paragraph 12 that Taylor "conspired" with a
14 subset of YCC's officers and directors to divest YCC of assets,
15 to channel assets to an unrelated entity, and to funnel money
16 away from YCC and its creditors "to line the medallion holders'
17 pockets at the expense of the financial health of YCC," do not
18 implicate a claim for fraud. Consequently, the court will not
19 require Trustee to further amend the complaint to provide more
20 particular details under Federal Rule of Civil Procedure 9(b).

21 D. Conclusion

22 In light of the foregoing, the court is denying Taylor's
23 MTD. Trustee should upload an order denying the motion for the
24 reasons set forth in this memorandum decision and comply with
25 B.L.R. 9022-1(c) before uploading the order. The order should
26 also reflect that a status conference will be held on January
27 31, 2020, at 1:30 p.m.

28 **END OF MEMORANDUM DECISION**